

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1085

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-against-

JUAN ANTONIO ALVAREZ, et al.,
Defendants-Appellants.

*On Appeal From a Judgment of the United States District
Court for the Southern District of New York.*

**BRIEF FOR TOMMY DAVIS
DEFENDANT-APPELLANT**



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UNITED STATES COURT OF APPEALS
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JUAN ANTONIO ALVAREZ, et al., :

Defendants-Appellants. :

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BRIEF FOR TOMMY DAVIS, DEFENDANT-APPELLANT

QUESTIONS INVOLVED

1. a) Whether the government was justified in reading to the jury the grand jury testimony of its own witness on re-direct examination.
b) Whether the appellant was unfairly prejudiced by said reading.
2. Whether the appellant was unfairly prejudiced by the government's introduction in evidence of various details surrounding his arrest on a prior crime.
3. Whether the trial court committed reversible error in denying appellant's request to charge concerning the origin of drugs introduced in support of an overt act attributed to appellant.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

Tommy Davis appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on January 21, 1977, following a jury trial, before the Honorable Richard Owen, United States District Judge, convicting appellant, under Indictment 76 Cr. 324, of three counts of possession with the intent to distribute, and the distribution of one-eighth and one-quarter kilograms of cocaine respectively, and with conspiracy so to do, in violation of 21 U.S.C. Sections 173, 174, 841(a)(1), 841(b)(1)(A), 846 and 963.

On January 21, 1977, the appellant was sentenced to concurrent terms of two years imprisonment on each of the three counts charged, followed by a three-year period of special parole.

STATEMENT OF FACTS

Appellant was charged in a forty-count indictment, along with thirty-two other defendants,* with conspiracy to possess and distribute cocaine and heroin (Count 1), and individually charged with two substantive counts of the distribution and possession with the intent to distribute of one-eighth kilogram of cocaine during May, 1971 (Count 22), and one-quarter kilogram of cocaine during December, 1971 (Count 23).**

* Twenty-two defendants eventually stood trial; of this number, seventeen were found guilty of various offenses, including Juan Antonio Alvarez, who was tried in absentia.

** Originally set forth as Counts 28 and 29 of the unredacted indictment.

The government's case against defendant-appellant was based almost entirely on the testimony of John Brown, a/k/a "Jack", an unindicted co-conspirator, and Michael Parker, who pleaded guilty to the crime of conspiracy under Count 1 of the indictment prior to the commencement of trial.

The third government witness was Sergeant Alfred Pepe, a police officer assigned to the Newark, New Jersey, Police Department, who testified concerning his 1970 arrest of defendant-appellant for the possession of 175 glassine envelopes of heroin.*

A. Jack Brown's Testimony

Jack Brown, the principal government witness, took the stand and testified concerning his relationship and alleged narcotics transactions with each of the twenty-two defendants on trial. Concerning the appellant, Brown related that they had first met during 1944, in Washington, D.C., and that there came a time during 1967 when they became close friends in New York City. Brown testified that he supplied appellant with drugs sometime during 1968, after advising him concerning the drug trade. His initial sale to appellant consisted of "maybe a half of an eighth of heroin and three or four ounces of cocaine" (1214).** Brown testified that thereafter, continuing up until 1972, he regularly supplied appellant with narcotics, usually cocaine, once or twice a month.

* These 175 glassine envelopes were the subject of an unsuccessful pre-trial motion to suppress held on July 21, 1976.

** Numerals in parentheses refer to pages in the trial transcript; GX refers to government's exhibit received in evidence.

When asked by the prosecutor whether he recalled any particular involvement of the appellant during the course of their illicit relationship, Brown related that during one of appellant's visits to his home in 1970, the latter disclosed that he had "had some trouble in Newark with the Police Department, meaning that he had gotten busted . . ." (1215). More specifically, Brown stated that appellant had informed him that "he had been arrested and charged with possession of narcotics . . .", which appellant had identified as heroin that he had previously obtained from Brown (1219).

Brown specified another transaction as having occurred in his home at 180 West End Avenue, following his birthday's celebration at the Waldorf Astoria Hotel, in May, 1971, which resulted in his selling to the appellant an eighth of a kilogram each of cocaine and heroin (1221).

Brown testified that a second transaction had taken place on November 24th or 25th, 1971, following a birthday party for his son, Todd, who was then in the hospital.* Brown testified that following the party's termination, appellant and other friends had gathered at his apartment for drinks, and that after all the other visitors had departed, he sold appellant either an eighth or a quarter kilogram of cocaine (1221).

On cross-examination, Brown was asked whether he had ever spoken to anyone about a meeting with the appellant sometime between

* This transaction was set forth in Count 23 as occurring sometime during the month of December, 1971. (The bill of particulars had set the time as December, 1972.) However, Brown's grand jury testimony, 3505-F, puts the date as between Todd's birthday, November 23, 1971, and his death on January 13, 1972.

his son Todd's birthday in November, 1971, and his death in January, 1972. Upon denying any recollection, he was shown, for purposes of refreshing his recollection, Exhibit 3505-F. His attention was directed to pages EC-5 and EC-10 thereof, pertaining to his March 1, 1976, grand jury testimony, in which he had twice testified that he sold one-quarter kilogram of cocaine to appellant sometime between his son's birthday on November 23, 1971, and his death on January 13, 1972. Reading 3505-F, Brown admitted that it was possible that he had made such a statement (2307-2309).

On Brown's redirect examination, the government gave Brown a copy of 3505-F, which had been shown to him briefly during cross-examination for the purpose of refreshing his recollection. The prosecutor frequently identified 3505-F as comprising the minutes of Brown's grand jury testimony (2687-2689).

The prosecutor then made the disclosure to the trial jury that he himself had interrogated Brown in the grand jury:

"Q. These are minutes of grand jury testimony, are they not?

A. Yes. (2689)

* * *

Q. You were being questioned by me at this time, were you not?

A. Yes, I am (sic). (2689)"

Following this, the prosecutor then proceeded, over various objections from appellant's counsel, to read back to Brown his entire verbatim grand jury testimony concerning the underlying transaction on which Count 23 was based:

"Q. Were you asked the following questions and did you give the following answers: (2689)

* * *

Q. You had a son named Todd, did you not?

A. Yes. (2689)

* * *

Q. His birthday is in November, is that right?

A. November 23rd. (2689)

* * *

Q. Your son Todd January 13th, is that correct?

A. Of '72. (2689)

* * *

Q. You recall that Mr. Figueroa directed your attention to page EJC-5 of the minutes of the grand jury of March 1, 1976?

A. Yes, sir. (2691)

Q. So let's continue.

* * *

Q. Between his last birthday party in November of 1971 and his death in January of 1972, did you have occasion to sell approximately a quarter kilogram of cocaine to Tommy Davis?

A. Before his death? (2691)

Q. Before Todd's death.

A. Yes, yes.

Q. But after his birthday party?

A. Correct. (2691)

Q. Do you recall giving those answers to those questions?

A. In the grand jury?

Q. In the grand jury.

A. Yes, I do. (2692)"

Unsatisfied, and turning to the other portion of Brown's grand jury testimony regarding the identical transaction, the prosecutor made ready to once again read the same script into the record. Appellant's defense counsel, during the recess, objected, inter alia, that a continuation of the redirect along these lines was cumulative, unnecessarily prejudicial, and improper redirect examination (2692-2701). Notwithstanding these objections and those of other defense counsel, the prosecutor was permitted to continue:

"Q. And do you recall that Mr. Figueroa directed your attention to portions of page 10 in his cross-examination? Do you recall that?*

A. Yes.

Q. Mr. Brown, were you asked the following questions and did you give the following answers: (2702)

* * *

'Q. Yes. In that same line:

"And you sale to Tommy Davis of approximately a quarter of a kilo of cocaine between the time of Todd's last birthday, in November of 1971, and his death in 1972?"

A. That was also, that was in Manhattan. (2703)'"

This ended the prosecutor's redirect examination of Jack Brown insofar as his alleged direct relationship with the appellant. Thereafter, redirect examination continued regarding the evidence referable to the remaining defendants on trial.

* This amounted to the fifth instance in which the prosecutor, despite objections, used appellant counsel's name in this fashion during his redirect examination pertaining to Exhibit 3505-F.

B. Michael Parker's Testimony

Michael Parker testified that he first met Jack Brown some months prior to marrying his daughter, Jackie, in June, 1969. And that he was first introduced to the world of narcotics by his father-in-law while sharing his apartment at 180 West End Avenue, New York City, during February, 1971 (3270-3296).

He testified that he actively began to assist Jack Brown in his narcotics transactions during April or May, 1971, after Brown had invited both he and his wife to live with him at 180 West End Avenue, in Manhattan. Parker explained his duties and stated that his primary tasks were those of courier, which consisted largely of procuring various drug paraphernalia for Brown, and that, in addition, he was responsible for taking phone messages and greeting potential customers at the Jack Brown residence (3300). Parker testified that numerous customers, including some appellants which he identified during the course of his testimony, would call at the Jack Brown apartment and that they would subsequently be summoned by Brown into the master bedroom where the actual negotiations would be held in private (3303-3325).

Parker claimed that appellant was a frequent visitor, sometimes together with his wife, to the Brown residence, and that the length of his visits varied anywhere from half-an-hour to half-a-day (3419-3420).

He testified that on one occasion near the beginning of summer, 1971, Jack Brown made the general disclosure to him that appellant was obtaining cocaine from him. Upon further prodding

by the government, Parker specified, although he couldn't remember the month or year, that after one of appellant's subsequent visits, Jack Brown gratuitously conveyed the information to him that he had given appellant one ounce of cocaine (3421-3422).

Parker contended that after returning to his home in Maryland in July, 1972, he maintained a close association with Jack Brown and was present at Brown's newly acquired home in Orangeburg, New York, during the visits of various appellants relative to their narcotics transactions. He also described his various trips to Miami, New York, and Washington, D.C., on behalf of Brown's illegal activities with various appellants (3423-3496).

C. Sergeant Alfred Pepe's Testimony

Sergeant Pepe, Newark, New Jersey, Police Department, testified that at about 9:30 P.M. on November 2, 1970, while assigned to the Narcotics Bureau, he observed appellant, for whom he had an outstanding arrest warrant, exit a tavern in Newark, New Jersey, enter the driver's seat of a parked car, and bend forward. He further testified that after approaching appellant and disclosing the existence of the arrest warrant, he placed him under arrest and searched him. Sergeant Pepe related that, as a result of the search, \$2,300 in cash and 75 glassine bags containing heroin were removed from appellant's pockets (GX52C) (5598-5601). A further search led to the recovery of an additional 100 glassine bags of heroin which Pepe testified were discovered on the front floor of the car (GX52B).*

* GX52B and 52C were later received in evidence following a stipulation establishing that the Newark Police Chemist, if called, would testify that an analysis of one envelope selected at random from each exhibit indicated the presence of heroin hydrochloride (5735).

Sergeant Pepe explained that after performing a field test on one of the glassine envelopes, which was positive for the presence of an opiate, the appellant was taken to the "narcotic office and processed" (5600-5601).

During his direct testimony, Sergeant Pepe was shown seven stacks of 25 glassine envelopes each, which he identified as having been the same envelopes as those seized from the appellant as a result of the incidental search following the execution of the arrest warrant in 1970 (GX52B, 52C) (5602-5604).*

On cross-examination, Sergeant Pepe conceded that GX52B had not been recovered by him, but by a brother officer instead, at the time of appellant's arrest (5618-5619). Further questioning developed that appellant had pleaded guilty to the possession of the narcotics for which he had been arrested by Sergeant Pepe, and had as a consequence served a period of imprisonment (5618-5627).

The government introduced a chart based on Telephone Company toll-receipts listing various appellants' names and telephone numbers with dates on which their phone numbers had been dialed by phones under the control of Frank Moten (GX150). This chart indicated that one such call had been made on June 1, 1972, to a phone listed to appellant's sister, Sylvia Ross, at an address in East Orange, New Jersey (6134).**

* Immediately prior to Sergeant Pepe taking the stand, objections heard at a side bar conference were overruled concerning the admissibility in evidence of Government Exhibits 52B and 52C on the grounds of their prejudicial nature based on Section 403 of the Federal Rules of Evidence (5596-5598). These objections were later renewed in conjunction with objections based on the disclosure to the jury that there was an outstanding arrest warrant against appellant (5607).

** The only defense witness testifying on behalf of the appellant,
(Cont. on next page)

To establish the fact that appellant resided with his sister, Special Agent Thomas King was called upon by the government to testify that on April 23, 1976, he had arrested appellant on the instant case at the same address in East Orange, New Jersey (6192-6194). Sergeant Pepe was re-called by the government to testify that he had observed appellant's car in the driveway of the East Orange residence at various times during the summer of 1972 (6201-6203).

D. The Trial Court's Charge and Marshalling of the Evidence

During the Court's marshalling of the evidence relative to the appellant, the trial judge mistakenly stated that appellant had denied receiving heroin from Brown:

"Davis further contends that the 175 street bags of heroin he possessed in 1970 was not heroin which he received from Brown as Brown has testified. Whether you credit Brown's testimony that this was his heroin and consider this possession of heroin as an act in furtherance of the conspiracy or you do not, it being only background in your determination as to whether Davis was in fact a member of the conspiracy as charged, I charge you that you may not consider this arrest or possession in connection with any determination of Mr. Davis' guilt on the substantive Counts 22 or 23. You may only consider it, as I have outlined to you, with regard to the conspiracy count" (9112-9113).

Later, appellant's counsel stated his exception to the charge, by objecting that it had been appellant's trial strategy not to take a position concerning the origin of the heroin recovered

** (Cont.)

his son, Renell Davis, testified, among other things, that during the period that the phone call was made, he had gone to school with Frank Moten's daughter and had communicated with her by phone (6880).

from appellant in 1970. However, since the question had been focused in the minds of the jury, appellant's counsel requested that the Court give the following charge:

" . . . if they find the evidence insufficient to connect that heroin with Jack Brown, they are to disregard the arrest of Tommy Davis for the 175 bags completely as having no probative value" (9194).

The same request to charge was renewed in substance by appellant's counsel shortly thereafter and again denied (9198).

ARGUMENT
POINT I

The Trial Court Erred By Permitting
The Prosecutor to Read Brown's Grand
Jury Testimony to the Jury.

There was no legal or factual basis for the prosecutor's verbatim reading of Exhibit 3505-F, consisting of Jack Brown's grand jury testimony regarding the narcotics transaction with appellant charged in Count 23.

Brown had not indicated during the government's redirect examination that his memory required refreshing. Furthermore, Exhibit 3505-F was not in evidence, nor had defense counsel's cross-examination disclosed its source or contents. United States v. Baratta, 397 F.2d 215 (2d Cir. 1968)

There had been no charge, either express or implied, against Brown of ". . . recent fabrication or improper influence or motive . . ." Rule 801(d)(1)(B), Federal Rules of Evidence. Consequently, there was no adverse connotation which the government was compelled

to rebut.

Exhibit 3505-F, which the government read to the jury, did not even qualify as a prior statement. It was the same statement that defense counsel had used to refresh Brown's recollection. Its probative value was nil; its prejudicial impact, great. United States v. Block, 88 F.2d 618 (2d Cir. 1937); Goings v. United States, 377 F.2d 753, 759-60 (8th Cir. 1967).

Considering that the government's case against appellant depended on Brown's sketchy testimony, the reading and re-reading of his grand jury testimony regarding Count 23 could only serve to unfairly etch in the jury's minds appellant's alleged criminality. Limiting instructions, if they could have been formulated, could not have remedied the harm. Its reading rendered no assistance to them as fact-finders.

Whatever harm existed was made even more extreme by the prosecutor's disclosure to the jurors that he himself had elicited the responses from Brown in the grand jury. Thereby, considering the leading nature of the grand jury questions, placing his own credibility in issue as a proponent of the answers. United States v. Puco, 436 F.2d 761 (2d Cir. 1971). This too, was exacerbated by five references by name to appellant's counsel during this relatively brief period of the prosecutor's redirect examination.

All resulted in contaminating the subsequent deliberations of the jury, with a consideration not only of impermissible prejudice, but of personal credibilities as well.

POINT II

The Trial Court Abused Its Discretion By Receiving Unfairly Prejudicial Evi- dence Concerning Appellant's 1970 Drug Arrest.

Prejudice resulting from the disclosure by Sergeant Pepe of appellant's six-year-old drug arrest reached the level of unfairness through his unnecessary revelations of various prejudicial details concerning that arrest. Disclosure of this additional prejudicial material only resulted in precluding a fair consideration by the jury of the remaining evidence presented against the defendant.

For instance, the receipt in evidence of the 175 glassine envelopes of heroin recovered from appellant during the 1970 arrest, constituted virtually the only physical evidence of narcotics during the fourteen-week trial. As such, it was necessarily highlighted out of all proportion. Cf. United States v. Ravitch, 421 F.2d 1196, 1204-05 (2d Cir. 1970). Consequently, what was received merely in support of a conspiratorial overt act, assumed overwhelmingly prejudicial impact in the overall context of the trial. Accordingly, the probative value of these narcotics, together with the testimony concerning the contemporaneous recovery of \$2,300 from the appellant, should have been declared outweighed by the accompanying prejudice. United States v. Byrd, 352 F.2d 570, 574-575 (2d Cir. 1965).

In a similar vein, Brown's claim during his direct examination that appellant had told him of his "being busted" and "arrested and charged with possession of narcotics . . .", together with Pepe's testimony that following appellant's arrest he had been taken to the

"narcotics office and processed", was in substance the equivalent of informing the jury that appellant had not only a prior criminal record, but a conviction as well. Analogously, it was at least equal in prejudice to the introduction of appellant's "mug" shot. United States v. Reed, 376 F.2d 226 (7th Cir. 1967); cf. United States v. Calarco, 424 F.2d 657, 660-1 (2d Cir. 1970).

The existence of an outstanding arrest warrant authorizing appellant's arrest on an unrelated charge constituted inadmissible evidence of another crime, the receipt of which was unauthorized by any recognized exception.

Viewed in the background of a trial replete with testimony by various DEA Special Agents concerning the execution of various warrants in Florida, Maryland, New Jersey, and New York, Pepe's informing the jurors of the arrest warrant must have alerted them to the probability that appellant had been involved in some unrelated criminal act prior to the day of his 1970 arrest. The knowledge of this warrant demanded of the jury that they consider appellant's guilt or innocence while disregarding the mystery of his unexplained lawlessness.

Cumulatively, the effect of the evidence regarding the 1970 arrest, was to unfairly prejudice the jury's consideration not only concerning the conspiratorial overt act which it represented, unavoidably it also resulted in prejudicial fall-out in connection with the jury's subsequent consideration of appellant's guilt on the substantive charges.

POINT III

The Trial Court Committed Reversible Error By Denying Appellant's Request To Charge Concerning His 1970 Drug Arrest.

Appellant was entitled to a determination by the jury as to whether Jack Brown was source of the heroin with which he had been arrested in 1970. This heroin represented a large part of the government's case, consequently the jury's determination was pivotal to deciding appellant's guilt or innocence on the conspiracy charges.

Accordingly, the issue of the heroin's source should have been given to the jury. Especially in view of the Court's erroneous allegation that appellant had as part of his trial defense strategy specifically denied that Brown was the source of the heroin. Consequently, it was error for the Court to twice deny appellant's request to charge that if they, the jury, did not find that Brown was the source they could disregard the evidence concerning the 1970 drug arrest (9112-9113); (9194-9198).*

POINT IV

Appellant adopts the applicable points of other counsel pursuant to Rule 28(i), F.R.A.P.

* Defendant's requests regarding the Court's Charge and Marshalling of Evidence, concerning prior crimes, appear on pages 9 and 10 respectively of Appellant's Appendix.

CONCLUSION

The judgment of conviction against Tommy Davis should be reversed and the case remanded with a direction that there be a retrial.

Respectfully submitted,

NICHOLAS FIGUEROA
Attorney for Tommy Davis

COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

- against -

JUAN ANTONIO ALVAREZ, *Zet al*
Defendants-Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

SS.:

I, Victor Ortega, being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 1715 Lacombe Avenue; Bronx, New York

That on the 13th day of April, 19 77 at 1 St. Andrews Plaza
New York, N.Y.

deponent served the annexed

upon

Robert Fiske Jr.
U.S. Attorney

~~Appendix~~ & Brief

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 13th
day of April, 19 77

Robert T. Brin

Victor Ortega

Victor Ortega

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977